No. 85-2010

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; LOCAL UNION 1165, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; and LOCAL UNION 2295, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioners,

v.

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., LYMAS L. WINFIELD, DOCK MEEKS, DAVID DANTZLER, JR., and JOHN R. HICKS, III, Individually and on behalf of all others similarly situated, and UNITED POLITICAL ACTION COMMITTEE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether a union violates Title VII and 42 U.S.C. § 1981 by deliberately treating the non-discrimination provisions of its collective bargaining agreement differently from other provisions, so that it intentionally avoids filing grievances for racial discrimination even though many of its members complain of widespread employer racial discrimination and the union's conduct serves to perpetuate a racially discriminatory environment.

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BRIEF FOR RESPONDENTS

COUNTER-STATEMENT OF THE CASE

A. The Holdings of the Courts Below

After a 32-day trial, the United States District Court for the Eastern District of Pennsylvania held Lukens Steel Company liable under Title VII and 42 U.S.C. § 1981 for intentional discrimination against its black employees as a class in a wide range of employment practices: initial assignment at

hire, discharge during the probationary period, promotion to craft positions, promotion to salaried positions, toleration of racial harassment, and denial of incentive pay to employees in the predominately black "Pits" seniority unit. (Pet. App. 146a-147a.)[1]

The District Court also found that Petitioners, the United Steelworkers of America and its Local Unions 1165 and 2295 (the "Unions"),[2] the bargaining agents for all hourly employees at Lukens, had intentionally discriminated against their black members at Lukens by deliberately avoiding enforcement of the non-discrimination provisions in the collective bargaining agreement between Lukens and the Unions.[3] The District Court found that the Unions had intentionally (1) failed to challenge the discriminatory discharges of probationary employees, (2) failed and refused to assert racial discrimination as a ground for grievances, and (3) tolerated and tacitly encouraged racial harassment. (Pet. App. 147a.) The District Court stated:

> The clear preference of both the company and the unions to avoid addressing racial issues served to perpetuate the discriminatory environment. In short, the unions' unwillingness to assert racial discrimination claims as such

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1. Citations to "Pet. App." refer to the appendix filed with the petition in No. 85-2010. A single consolidated joint appendix was filed for both this case and No. 85-1626. It consists of two volumes and is cited herein as "JA". The brief filed by the petitioner Unions is cited as "Unions' Brief", and the brief filed by the United States as *amicus curiae* is cited as "U.S. Brief". The notes of testimony are cited as "N.T." followed by the trial day and the page of the transcript made that day.

2. Local 1165 represented almost all the hourly employees at Lukens. At the time of trial it had approximately 2600 members, while Local 2295 had approximately 80 members. (Pet. App. 133a.)

3. The Unions assert that "[t]he district court found no discrimination committed by the unions." (Unions' Brief 5.) *See also* Unions' Brief 18 ("the district court rejected every claim that the unions had committed acts of discrimination against black employees"); Unions' Brief 21 ("[t]he unions in this case have not been found to have engaged in any discrimination against respondents"). These statements are simply not accurate. The District Court explicitly found: "The defendant unions have discriminated against the plaintiff class on racial grounds, in violation of Title VII and §1981." (Pet. App. 147a.)

> rendered the non-discrimination clause in the collective bargaining agreement a dead letter.

(Pet. App. 138a.)

Although the District Court agreed with other courts which have held that "mere union passivity in the face of employer-discrimination renders the unions liable under Title VII and, if racial animus is properly inferrable, under §1981 as well," (Pet. App. 139a (citations omitted)), the court did *not* base its decision on that ground. Rather, it found as follows:

> *[T]he evidence in this case proves far more than mere passivity on the part of the unions*. The distinction to be observed is between a union which, through lethargy or inefficiency simply fails to perceive problems or is inattentive to their possible solution (in which case, at least arguably, the union's inaction has no connection with race) and a union which, aware of racial discrimination against some of its members, fails to protect their interests. *A union which intentionally avoids asserting discrimination claims*, either so as not to antagonize the employer and thus improve its chances of success on other issues, or in deference to the perceived desires of its white membership, is liable under both Title VII and §1981, regardless of whether, as a subjective matter, its leaders were favorably disposed toward minorities.

(Pet. App. 139a-140a (emphasis added).)

The United States Court of Appeals for the Third Circuit affirmed the District Court's findings against Lukens with respect to discrimination in discharge of employees on probation and in promotions to craft positions. The Court of Appeals vacated the District Court's findings of discrimination by Lukens in promotion to salaried positions and toleration of racial harassment, and it remanded the case to the District Court for reconsideration of those findings in light of the Court of Appeals' ruling that the proper limitations period for Section 1981 claims was two years, rather than the six-year period applied by the District Court.[4] The Court of Appeals

4. The Court of Appeals' holding on the applicable statute of limitations is the subject of the Writ of Certiorari granted by this Court in *Goodman v. Lukens Steel Company*, No. 85-1626.

also held that none of the named plaintiffs had standing to assert the claims of discrimination in initial assignment, and it remanded those claims to the District Court to consider the possibility of intervention by other class members to represent the class on those claims.[5] Finally, the Court of Appeals reversed the District Court's finding that Lukens' denial of incentive pay to employees in the "Pits" seniority unit was racially discriminatory. (Pet. App. 34a.)

The Court of Appeals affirmed all of the District Court's findings of discrimination by the Unions. (Pet. App. 27a.)[6] In affirming these findings of intentional discrimination by the Unions, the Court of Appeals stated:

> The case against the unions here is stronger than one of mere acquiescence. The district court found that *the unions intentionally avoided asserting claims of discrimination . . . . The deliberate choice not to process grievances*

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5. The Court of Appeals' remand on this issue and certain other aspects of its decision are subjects of a Petition for Certiorari by Lukens captioned *Lukens Steel Company v. Goodman*, No. 85-1645. As noted by the Unions in their brief (Unions' Brief 2 n.1), the Court has deferred consideration of this Petition pending final approval of a settlement agreement between the plaintiffs and Lukens. The District Court has approved that settlement, but two of the named plaintiffs have filed a Notice of Appeal from that approval.

6. The Court of Appeals did not, as the Unions claim (Unions' Brief 10-11 n. 11), vacate the District Court's holding that the Unions had discriminated against the plaintiff class by tolerating and tacitly encouraging racial harassment. Nor does such a result follow from the action of the Court of Appeals in vacating the District Court's holding that Lukens had discriminated against the plaintiff class by tolerating racial harassment. (Pet. App. 34a.) Unlike the Unions, Lukens did not admit that it treated complaints of racial harassment differently from other complaints. Therefore, the plaintiffs had to prove their case against Lukens on this issue by the accumulation of sufficient anecdotal testimony to demonstrate a pattern or practice. The shortening of the limitations period so that some of those incidents became non-actionable arguably had an effect on the District Court's finding of a pattern or practice by Lukens within the limitations period. On the other hand, Union officials *admitted* that they had a practice of treating grievances alleging racial discrimination differently from other grievances (Pet. App. 138a), so it was not necessary for plaintiffs to prove an accumulation of incidents in order to demonstrate a pattern and practice of discrimination by the Unions.

> *[based on discrimination] . . . violated § 703(c)(1) of Title VII because it discriminated against the victims who were entitled to representation.* The district court's finding of intentional discrimination properly supports the claims under § 1981 as well. We therefore find no error in the district court's assessment of liability against the unions.

(Pet. App. 26a-27a (emphasis added).)

B. Statement of the Facts[7]

1. Black Employees' Experience at Lukens Steel Company

The District Court found (and the Unions do not deny) that plaintiffs had adduced a "massive amount of incontrovertible evidence of historical discrimination on account of race at Lukens." (Pet. App. 122a; *see* Pet. App. 68a.) This intentional discrimination affected both the black employees' pay checks and their working conditions. Upon hire, they were assigned to lower paying jobs than whites; during their probationary period,[8] they were much more likely to be discharged than whites; and they had much less opportunity than white employees to achieve promotion to better-paying craft jobs or salaried positions—in part because of Lukens' widespread use of racially discriminatory tests. (Pet. App. 73a-81a, 85a-90a, 94a-103a, 146a-147a.)

Racial harassment was also endemic at Lukens. "[A] large number of foremen treated their white employees more

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7. Throughout this brief, the plaintiffs rely primarily on the facts as found by the District Court because neither the Unions nor the Government challenge any of these findings as "clearly erroneous". The District Court's factual findings, including holdings on "ultimate questions of fact", *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983), can be set aside only if they are "clearly erroneous". *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-76 (1985).

8. The collective bargaining agreement at Lukens provides that new employees must serve a probationary period during which they are subject to discharge at the company's discretion. (II JA 370.) However, since 1965 the agreement also prohibited race discrimination, and in 1974 the provision relating to the probationary period was amended to prohibit discrimination on the grounds of race, color, religious creed, national origin or sex in the exercise of the company's discretion. (II JA 378-79.)

leniently [with respect to discipline] than they treated their black employees." (Pet. App. 94a.) The "mass of evidence of individual instances of racial harassment and/or discriminatory treatment" presented by the plaintiffs (Pet. App. 111a) showed that the racial atmosphere of Lukens was egregious. That evidence includes the following prominent events which took place in the 1970's:

- A cross was burned in an area where black employees normally changed clothes. (Pet. App. 118a.) (This event was dated in the mid-1970's by the testimony of Norris J. Domangue, Lukens' Director of Personnel Administration (N.T. 11.183).)
- The words "Uncle Remus" were painted on the hard hat of Lukens' only black general foreman, and "KKK" was scrawled on his work papers. (Pet. App. 115a-116a.)
- Over a period of years, a white salaried clerk made repeated racially derogatory comments to and about black employees and had a habit of addressing them as "curly", despite black employees' repeated complaints to his superiors. (Pet. App. 116a-117a.)
- In 1978, at least three Lukens employees wore Ku Klux Klan armbands to work there. (Pet. App. 118a.)
- A union official, who was assigned to drive plaintiffs' attorneys' legal assistant to the train station after she had examined documents in preparation for trial, asked her, "How can you stand all those blacks in Philadelphia?" (I JA 49-50.)
- "Racially derogatory graffiti have regularly and constantly appeared on the bathroom walls at Lukens . . . ." (Pet. App. 118a.)
- The words "Go home nigger. You don't belong here" were written on the wall of a "pulpit" which named plaintiff Charles Goodman was assigned to clean. Both the employees who worked in the pulpit regularly at that time were white. (Pet. App. 115a.)

Despite these conditions, Lukens' officials in charge of employee relations and equal opportunity, in their trial testi-

mony, "professed total ignorance of any racial discrimination at Lukens at any time." (Pet. App. 122a.) Lukens management regularly exhibited "a tendency to presume that any charge of racial discrimination was, almost by definition, either totally unfounded or quite trivial." (Pet. App. 120a.) Some management officials were themselves racially biased and others "were apprehensive—unduly so, probably—about the potential effects upon the morale of the white work force, if prompt and significant changes in favor of blacks were implemented." (Pet. App. 119a.)

These attitudes were abetted by the Unions' deliberate avoidance of racial issues, which "served to perpetuate the discriminatory environment." (Pet. App. 138a.)

2. The Unions' Discrimination

The Unions were not ignorant of the conditions which their black members faced at Lukens. "[M]any black employees asserting grievances complained about discriminatory treatment and harassment . . . ." (Pet. App. 138a.) Nevertheless, although their collective bargaining agreement contained several provisions prohibiting racial discrimination (II JA 358-59, 378-79, 541), the Unions deliberately chose to treat violations of these provisions differently from violations of other terms of the collective bargaining agreement. (Pet. App. 138a-140a.) While the Unions filed more than 8,000 grievances between 1967 and 1980 (Pet. App. 135a), they had a policy to "intentionally avoid[ ] asserting [racial] discrimination claims" (Pet. App. 139a), and they "almost never did so until after this suit was filed" (Pet. App. 138a).

Some actions by the Unions outside the limitations period illuminate their motive in adopting this policy.

The United Steelworkers International Union is the certified collective bargaining representative for Lukens' hourly employees; the two local unions are joint agents with the International Union for grievance processing and other local functions. (Pet. App. 132a.) In practice, during the 1960's and 1970's the International Union negotiated "basic steel" agreements with the largest steel companies, and "[a]nything that was agreed to in the International package . . . would be

implemented at the local level." (I JA 193 (testimony of Lloyd Lawrence, President of Local 1165 from 1964 to 1970, I JA 191); *see* Pet. App. 132a.)

In 1962, the "basic steel" bargaining produced agreement on a provision prohibiting racial discrimination. In a unique departure from their uniform practice of including "basic steel" provisions in the Lukens collective bargaining agreement, Lukens and the Unions omitted the non-discrimination provision from the agreement negotiated at Lukens in 1962. The non-discrimination provision was not even discussed then. It was not added to the Lukens agreement until three years later, when *the company proposed it late in the negotiations*. (Pet. App. 133a-134a.)[9]

Lukens historically had racially segregated locker rooms. They were not completely desegregated until 1966. (Pet. App. 68a, 134a.) Lukens and Union officials admitted that segregated facilities were *never discussed* in collective bargaining negotiations and that the Unions did not protest the practice of segregation. (I JA 150, 152, 164-65 [and N.T. 14.38], 201; II JA 727-30.) Complaints by black Lukens employees to Union officials about segregated facilities were met by inaction and by expressions of concern over the possible "repercussions" of racial integration of plant facilities. (I JA 12-13, 83-85, 250-51.) Even when the Pennsylvania Human Relations Commission required Lukens to desegregate the locker rooms, the Unions' District Director informally agreed to an extension of time. (Pet. App. 134a.)[10]

At about the same time a few black men working in the Open Hearth Pits joined together and complained to management about segregated facilities and other problems. Even

9. The company's suggestion was made after the desirability of such a provision had been discussed in the course of a governmental compliance review. (I JA 74-75; II JA 353-54.) There is no indication in the record that a non-discrimination provision would have been added to the Lukens agreement had government pressure not forced Lukens to propose it.

10. It is interesting that management had no hesitation, some years earlier, in writing to the Unions to request a change in the seniority rules to protect some long-service employees, including one whose mill had been shut down and "due to the fact that he was white he was not considered for placement on the Shears and other Mills. . . ." (II JA 333-34.)

though two members of the committee were union shop stewards, they received no help from the Unions, and at trial the person who had served as Local 1165 president from 1964 to 1970 "testified that he was unaware of the existence of any such committee, and had no recollection of any group of black employees having complained about racial matters at the time." (Pet. App. 134a.) By contrast, a management official recalled the committee's complaints and testified that he had discussed them with "union representatives." (I JA 80-81.)

As the District Court noted, the foregoing incidents did "not provide grounds for relief" against the Unions because they occurred outside the limitations period (Pet. App. 134a), but they do shed light on the Unions' attitude (Pet. App. 133a). *See United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977).

The crux of the evidence upon which the District Court found the Unions liable was the Unions' deliberate policy within the limitations period of not seeking to enforce the non-discrimination provisions of the collective bargaining agreement in the same manner or to the same degree as they sought to enforce other provisions. As set forth above, a general non-discrimination provision was added to the Lukens collective bargaining agreement in 1965. As a result of "basic steel" bargaining, specific non-discrimination provisions were added with respect to testing in 1968 and with respect to probationary discharges in 1974.[11] Whatever benefit those

11. The general provision, which was added to the "basic steel" agreement in 1962 but did not appear in the Lukens agreement until 1965, states as follows:

> It is the continuing policy of the Company and the Union that the provisions of this Agreement shall be applied to all employees without regard to race, color, religious creed, national origin or sex.

(II JA 358-59.)

Three years later, the "basic steel" negotiations produced agreement on a provision providing that "[t]ests shall be fair in their makeup and in their administration [and] shall be free of cultural, racial or ethnic bias . . . ," which was incorporated in the Lukens collective bargaining agreement. (II JA 360-63, 538-41.)

Finally, in 1974, by the same means, a provision was added to the Lukens agreement providing that the company's discretion to lay off or discharge employees during the probationary period after hire "will not be

provisions may have produced at other steel companies, they were rendered "dead letters" at Lukens because the Unions there deliberately chose to avoid invoking them despite the Unions' knowledge of widespread racial discrimination at Lukens. (Pet. App. 137a-138a.)

Many black employees complained to the Unions about the pervasive racial discrimination and harassment occurring at Lukens. (Pet. App. 138a.) Nevertheless, until 1975—when the class was certified in this action—the Unions had filed no more than three grievances charging racial discrimination.[12]

Although Lukens consistently used racially biased tests

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used for purpose of discrimination because of race, color, religious creed, national origin or sex . . . ." (II JA 378-79.)

12. II JA 424, 448-49, 451-54. None of these grievances explicitly claims *racial* discrimination. Only one (II JA 424) refers to the non-discrimination provision of the collective bargaining agreement, but the context of the others suggests that they *may* have been about racial discrimination. The Unions claim credit for three more pre-1975 grievances asserting discrimination claims. (II JA 434-36, 622, 669; *see* Unions' Brief 8 n.8.) However, neither the language nor the context of those three grievances indicates that they claimed racial discrimination or any other kind of discrimination covered by either Title VII or the non-discrimination provisions of the collective bargaining agreement. Indeed, the Unions acknowledged, in their Proposed Findings of Fact in the District Court (II JA 731 n.44), that the record does not indicate whether *racial* discrimination was claimed in the grievances in Plaintiffs' Exhibit 848 (II JA 433-37) and Unions' Exhibit 276 (II JA 622-25), even though those grievances used the word "discrimination".

The Unions' current claim also ignores the evidence that use of the word "discrimination" did not necessarily mean *racial* discrimination. Benjamin Pilotti, who was a Local 1165 grievance committeeman from 1962 and president from 1975 to at least 1980, testified that the Unions often made claims of discrimination which had nothing to do with racial discrimination. (II JA 169, 171.)

The Unions also claim credit for 17 additional "discrimination" grievances filed in 1975 or thereafter. (Unions' Brief 8 n.8.) By contrast, Lukens' "Grievance Report 1976-1980" shows only nine "discrimination" grievances, including four filed by white employees. (II JA 488.) If the Unions actually filed 17 race discrimination grievances between 1975 and early 1980, one would have to wonder about the reason for the sharp increase after the class was certified in this case. "Such actions in the face of litigation are equivocal in purpose, motive and permanence." *Jenkins v. United Gas Corp.*, 400 F.2d 28, 33 (5th Cir. 1968).

(Pet. App. 87a-90a), the Unions never filed a grievance charging that any test was racially biased. On the second day of trial of this action, the Union requested from Lukens information on the "shop math" test which Lukens had been using for more than seven years. (Pet. App. 89a; I JA 230; II JA 632-33.) The Unions claim that it was easier and more effective to challenge tests on the ground that they were not job-related. (Unions' Brief 12-13.) However, so far as the record shows, they rarely challenged tests at Lukens on that ground either. Between 1965 (when the general contractual non-discrimination provision came into effect) and 1974 (a year after this action was filed), the Unions filed only one grievance at Lukens challenging a test as not job-related.[13]

In addition, through the time of trial, the Unions had never filed any grievance against Lukens' racially discriminatory discharges of black employees during their probationary period, despite knowledge that blacks were being discharged at a noticeably disproportionate rate. (Pet. App. 137a.)[14]

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13. That grievance challenged the procedure for manning the new strand-casting facility, for which Lukens used a battery of tests. (II JA 641-52.)

14. While the Unions have suggested that they may have been unaware of Lukens' racial discrimination in probationary discharges and/or of the non-discrimination clause added in 1974, the record establishes otherwise. Asked about disproportionate discharges of black employees, the president of Local 1165 testified, "It seems to me that maybe blacks would outnumber the whites, yes, but I don't have the right numbers." (I JA 166.) Although he claimed to have attended a civil rights conference in 1979 where the civil rights director of the International Union discussed probationary discharges of blacks (I JA 166-67), he denied knowing that the non-discrimination clause existed (I JA 168). Nevertheless, he also claimed to have filed a grievance for a black employee who had been discharged during the probationary period, but he could not remember the name or job of the grievant. (I JA 167.) No such grievance was introduced at trial. The president asserted that the grievance chairman processed that grievance (*id.*), but the grievance chairman testified unequivocally, "We don't file grievances for probationary employees." (I JA 226.) Although the chairman testified that he was aware of the contractual provision prohibiting discrimination in probationary discharges (I JA 226-27) and that probationary employees had come to him and asked him to file a grievance under that provision, he stated that he did not do so. (I JA 227.) Not surprisingly, the

By contrast, the Unions filed more than 8,000 grievances within the limitations period (Pet. App. 135a), including 534 grievances over "crossing seniority lines" which were filed in just five years, 1970-74 (II JA 499). Lukens attributed this activity over crossing seniority lines to "the surveillance exercised by certain grievance committeemen," and noted "the Union . . . are [*sic*] dedicated to keeping craft job assignments pure. . . ." (II JA 499-500).[15]

In short, as the District Court found,

> It is undisputed that the unions were reluctant to assert racial discrimination as a basis for a grievance and almost never did so until after this suit was filed, even though many black employees asserting grievances complained about discriminatory treatment and harassment, and even though the union itself believed that racial discrimination was involved in the grievance.

(Pet. App. 138a.)

A particularly striking example is the case of class member Alfred Hicks. Hicks was discharged in July 1978. A white shop steward in Hicks' area of the plant told the union representatives that he thought the discharge was due to racial discrimination. (I JA 290-91, 295.) Yet both the president and Grievance Committee chairman opposed mentioning race discrimination in Hicks' grievance. (I JA 295-96.) Accordingly, the grievance did not assert race discrimination; nor was race discrimination argued on Hicks' behalf. (*Id.*; II JA 466-79.)

The Unions' claimed non-discriminatory reason for this position was that black employees' grievances could be resolved more easily by relying on other provisions of the collective bargaining agreement because raising the issue of racial

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District Court concluded that the Unions "knew that blacks were being discharged by Lukens at a disproportionately higher rate than whites" (Pet. App. 137a) and intentionally discriminated against black employees by failing to file grievances challenging that conduct. (Pet. App. 147a.)

15. Significantly, one of the areas in which Lukens was found to have discriminated against the plaintiff class was in denial of equal access to craft positions. (Pet. App. 79a-81a, 85a-90a, 146a-147a.)

discrimination caused the company to "get its back up" and made the grievance harder to settle. (Pet. App. 138a.) This explanation, however, could not withstand scrutiny, for the Unions had refused to invoke the non-discrimination clause even for members' complaints about racial harassment which did not otherwise violate the collective bargaining agreement. (*Id.*) Likewise, the Unions' refusal to address racial discrimination left the victims of discriminatory probationary discharges without *any* remedy because discrimination was the *only* ground on which probationary discharges could be challenged.[16]

Finally, the Unions' avoidance of racial issues also allowed the company to continue to ignore the pervasive discrimination and "served to perpetuate the discriminatory environment." (*Id.*) Thus, the Unions' policy allowed continuing and repeated violations of the non-discrimination provisions of the collective bargaining agreement, so its "tactical" justification for that policy was exposed as pretextual or, in the District Court's word, "unacceptable." (*Id.*) As the District Court concluded:

> The clear preference of both the company and the unions to avoid addressing racial issues served to perpetuate the discriminatory environment. In short, the unions' unwillingness to assert racial discrimination claims as such rendered the non-discrimination clause in the collective bargaining agreement a dead letter.

(*Id.*)

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16. Contrary to the Unions' assertion, therefore, the District Court did not find that the Unions' approach "might achieve full vindication for individual grievances" (Unions' Brief 22) when the grievance involved racial harassment or probationary discharges. (Pet. App. 138a.) Moreover, the Unions in the present case filed numerous grievances which were not on behalf of any individual employee. Indeed, more than 37% of the cases heard in arbitration involved non-individual grievances. *See* N.T. 25.118-19; *compare* Unions' Exhibit 702 *with* Unions' Exhibit 704A. There is no evidence that the Unions ever filed a non-individual grievance over racial discrimination. Nor do the numbers of individual grievances filed or won in arbitration give any support to the Unions' position. As the District Court found, those numbers are subject to different, conflicting explanations, making the evidence "inconclusive on this issue". (Pet. App. 136a-137a.)

This case, then, involves the deliberate decision by the Unions, in the face of known racial discrimination at Lukens, to avoid raising claims involving an alleged breach of the non-discrimination provisions of the collective bargaining agreement. Moreover, the Unions' practice of avoiding charges of racial discrimination was not based on a belief that such charges lacked credibility. To the contrary, the Unions decided not to process racial discrimination claims—"even though the union itself believed that racial discrimination was involved in the grievance" (Pet. App. 138a)—"either so as not to antagonize the employer and thus increase [their] chances of success on other issues, or in deference to the perceived desires of [their] white membership" (Pet. App. 139a-140a). There is no evidence that the Unions were similarly reluctant to assert any other type of grievance.

SUMMARY OF THE ARGUMENT

The Unions were well aware of the wide-ranging racial discrimination in which Lukens engaged. The Unions were also vested, under the non-discrimination provisions of their collective bargaining agreement, with the power to grieve such racial discrimination. The Unions, however, deliberately chose to avoid attempting to enforce those non-discrimination provisions. The Unions' failure to enforce those provisions did not arise from lethargy or inadvertence or a disbelief in the validity of their members' complaints of racial discrimination. Rather, the Unions made a deliberate policy decision based on their admitted concern that raising the issue of *racial* discrimination tended to upset the employer. Thus, the Unions' deep-seated reluctance to challenge violations of the collective bargaining agreements' non-discrimination provisions arose from the fact that the *issue of race* was involved.

There is no evidence that the Unions similarly avoided enforcing any other provision of the collective bargaining agreement. Indeed, the Unions filed thousands of grievances asserting violations of other collective bargaining agreement provisions. The bottom line is that in carrying out their grievance processing function the Unions treated complaints of

racial discrimination differently from complaints alleging other violations of the collective bargaining agreement. Such disparate treatment employing a race-based classification violates Title VII's prohibition against union discrimination.

This conclusion is wholly consistent with federal labor policy. The decisions of the District Court and Court of Appeals in this case do not hold unions responsible for employer discrimination; nor do they require unions to fight employer discrimination in the abstract. They do not impose on unions any new affirmative obligation. They simply hold that unions may not systematically treat complaints of employer racial discrimination differently from other complaints by their members.

Similarly, the Unions violated Section 1981 because they treated contract terms enacted for the benefit of minority employees differently from other contract terms and thus denied to black employees the same rights to contract enforcement as white employees enjoyed. Unlike the employers in *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375 (1982), the Unions in this case were well aware of employer discrimination. Equally important, unions have a very different relationship to employees than employers have. Unlike an employer, such as the petitioners in *General Building Contractors*, a union's function is to provide *representation* for employees and to press their claims with their employer. Thus, a union, like the Petitioners in this case, which makes a distinction in the handling of employees' claims, depending on whether or not those claims allege racial discrimination, is not simply failing to challenge employer discrimination but is itself actively discriminating in the performance of its duties.

ARGUMENT

I. The Unions Violated Title VII.

A. Title VII Forbids Racial Discrimination By Unions.

In enacting Title VII, Congress recognized the importance of prohibiting racial discrimination not only by employ-

ers, but also by labor unions, in order to create a working environment wholly free from discrimination. Congress, therefore, enacted three provisions prohibiting racial discrimination in any form by labor organizations. These provisions, set forth in section 703(c) of Title VII, make it unlawful for a union:

> (1) . . . to discriminate against any individual because of his race . . .;
>
> (2) to . . . classify its membership . . . in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee . . . because of such individual's race . . .;
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 2000e-2(c).

These provisions must be understood in light of the relationship between a union and the employees who are members of the bargaining unit. As the Government explains, "a union exists *to represent* the bargaining unit employees' interests and *to press their claims* with the employer." (U.S. Brief 20 (emphasis added).)

Traditionally, this representative function involves two primary modes. The first, collective bargaining, is not directly at issue in this case. The second comprises efforts to enforce—through the grievance procedure—the agreements reached during collective bargaining. If Title VII's prohibition on union discrimination is to be given meaning, a union may not discriminate in performing (or refusing to perform) this second representative function of enforcing its members' rights under the collective bargaining agreement.

In their brief, the Unions inexplicably assert that "§§ 703(c)(1) and (c)(2) . . . have no application here" (Unions' Brief 26), and base their argument almost entirely on § 703(c)(3). While the District Court did not specify the paragraph of § 703(c) upon which it relied, the Court of

Appeals concluded that the Unions' conduct violated the general prohibition of § 703(c)(1) against discrimination. (Pet. App. 26a.)[17] The holding before this Court, therefore, is the conclusion of the Court of Appeals that the Unions' conduct in intentionally failing to raise grievances involving racial discrimination constituted discrimination by the Unions on the basis of race in violation of § 703(c)(1).

B. A Union Unlawfully Discriminates When It Treats Grievances Alleging Racial Discrimination Differently From Other Grievances.

"Discrimination" means "a distinction in treatment" or "different treatment." 110 Cong. Rec. 5863-64 (1964) (remarks of Sen. Humphrey) (quoted in Unions' Brief 26-27 n.22).

In claiming that the Unions have not "discriminated" within the meaning of Title VII, the Unions and the Government overlook the fundamental fact that the Unions have *classified grievances according to race*. They have singled out for different treatment those grievances which allege racial discrimination by the employer; in the words of the District Court, they have been "reluctant to assert" such grievances. (Pet. App. 138a.) Accordingly, this case is governed by the principles enunciated in this Court's cases holding that governmental actions which single out efforts to achieve racial equality, and place unique impediments in the way of such efforts, discriminate on racial grounds in violation of the Fourteenth Amendment. *See, e.g., Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982); *Hunter v. Erickson*, 393 U.S. 385 (1969).[18]

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17. The Unions' entire discussion of § 703(c)(1) is limited to a single footnote, in which the Unions dismiss the Court of Appeals' reliance on § 703(c)(1) as "no more than a play on words [that] does not bear analysis." (Unions' Brief 26.)

18. Significantly, the Government asserts that a union's relationship to its members resembles a "limited purpose governmental unit". (U.S. Brief 20, *citing Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944).) The Government further admits, "Of course, *like a governmental unit*, if a union intentionally discriminates it is rightly subject to liability and sanctions." (U.S. Brief 21 (citation omitted) (emphasis added).)

Hunter involved an amendment to the Charter of the City of Akron (Section 137) which suspended the City's fair housing ordinance and required the approval of the electors before any such ordinance could be effective in the future. In holding that Section 137 violated the Equal Protection clause of the Fourteenth Amendment, this Court described the effect of Section 137 as follows:

> Section 137 thus drew a distinction between those groups who sought the law's protection against racial, religious, or ancestral discrimination in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends. Those who sought, or would benefit from, most ordinances regulating the real property market remained subject to the general rule.
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> * * *
>
> The Akron charter obviously made it substantially more difficult to secure enactment of ordinances subject to § 137.
>
> Only laws to end housing discrimination based on "race, color, religion, national origin or ancestry" must run § 137's gantlet.

393 U.S. at 390. Similarly, in the present case, the Unions' reluctance to assert discrimination grievances drew a distinction between blacks who sought to enforce the contractual prohibition against racial discrimination and employees who sought to use the grievance process "in the pursuit of other ends." (*Id.*) The Unions adduced no evidence that they were reluctant to assert any kind of grievance claim other than racial discrimination; indeed, the 8,000 grievances they filed belie any such claim. (Pet. App. 135a.) The Unions' policy, like Section 137, "places special burdens on racial minorities within the governmental [or grievance] process." 393 U.S. at 391.

In *Washington v. Seattle School District*, this Court struck down a Washington state statute, adopted through initiative, which removed from school boards the power to use mandatory busing for the purpose of racial integration but allowed school boards to use mandatory busing for other pur-

poses. This Court held that the statute was discriminatory and violated the Fourteenth Amendment because "it uses the racial nature of an issue to define the governmental decision-making structure, and thus imposes substantial and unique burdens on racial minorities." 458 U.S. at 470. Similarly, the Unions in the present case used "the racial nature of an issue" as a criterion in asserting grievances; they imposed "substantial and unique burdens on racial minorities" by their reluctance to process grievances against racial discrimination.

It is significant that this Court found that the governmental entities in the *Hunter* and *Seattle School District* cases had engaged in racial discrimination by changing their procedures for certain desegregation actions even though the Constitution did not compel them to take those actions.[19] Similarly, even if Title VII (and Section 1981) did not require the Unions to challenge racial discrimination in the abstract, the Unions discriminated in violation of Title VII (and Section 1981) by intentionally treating racial discrimination grievances differently from other grievances under the collective bargaining agreement.

Hunter and *Seattle School District* also answer the contention of the Unions and the Government that the Unions lacked the intent necessary for their actions to constitute discriminatory treatment in violation of Title VII (and Section 1981). In *Seattle School District*, this Court acknowledged the holdings of *Washington v. Davis*, 426 U.S. 229 (1976), and *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), that disparate impact is not alone enough to constitute a violation of the Fourteenth Amendment. 458 U.S. at 484-85. It held, however, that the necessary intent is satisfactorily established when the challenged act embodies an explicit racial classification:

> We have not insisted on a particularized inquiry into motivation in all equal protection cases: "A racial classification, regardless of purported motivation, is pre-

19. The school desegregation plans involved in *Seattle School District* were voluntarily adopted by the cities of Seattle, Tacoma and Pasco, 458 U.S. at 460-462, 464 n.7, and the district court in that case made no findings of *de jure* segregation, *id.* at 464 n.8.

sumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S., at 272. . . . And legislation of the kind challenged in *Hunter* similarly falls into an inherently suspect category.

There is one immediate and crucial difference between *Hunter* and the cases cited by appellants. While decisions such as *Washington v. Davis* and *Arlington Heights [v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977),] considered classifications facially unrelated to race, the charter amendment at issue in *Hunter* dealt in explicitly racial terms with legislation designed to benefit minorities "as minorities," not legislation intended to benefit some larger group of underprivileged citizens among whom minorities were disproportionately represented. This does not mean, of course, that every attempt to address a racial issue gives rise to an impermissible racial classification. See *Crawford v. Los Angeles Board of Education*, 458 U.S. 527 [1982]. . . . But when the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly "rests on 'distinctions based on race.' " *James v. Valtierra*, 402 U.S. [137,] 141 [(1971),] . . . quoting *Hunter v. Erickson*, 393 U.S., at 391.

458 U.S. at 485-86 (footnotes omitted).

In the present case, the Unions' policy to avoid asserting violations of the non-discrimination provisions is precisely the type of explicit racial classification involved in *Seattle School District*. The Unions admit that their policy of reluctance to grieve racial discrimination was based on concern about Lukens' reaction to *the racial nature of the grievances*. (Unions' Brief 9-10.) The Unions thus had the intent to treat certain grievances—those charging racial discrimination—differently from other grievances, because of the issue of race.[20] In short, the Unions intentionally made a distinction

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20. As the Unions concede, if a union has " 'take[n] [race] into ac-

in treatment based on race. *Cf. Lee v. Nyquist*, 318 F. Supp. 710, 718 (W.D.N.Y. 1970) (three-judge court) ("the state creates an 'explicitly racial classification' whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area") (footnote omitted), *aff'd mem.*, 402 U.S. 935 (1971), quoted and followed in *Seattle School District*, 458 U.S. at 468-69. Thus, the Unions intentionally discriminated on the basis of race.[21]

While the Unions' practice of not filing *any* grievances over probationary discharges might *seem* to be facially neutral, that apparent neutrality disappears when it is recognized that the *only* ground on which such discharges could be the subject of a grievance is discrimination.[22] Thus, the Unions' refusal to file grievances over probationary discharges is displayed as simply an element of the Unions' admitted practice of reluctance to assert grievances of racial discrimination.

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count' . . . . [s]uch an action would constitute intentional discrimination by the union" (Unions' Brief 29 n.25 (first two brackets in original), *quoting McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285 (1976)).

21. This Court has held that a classification based explicitly on race is discriminatory, even if created with a "preferential purpose". In *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 307 (1978), this Court held:

> If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.

22. Similarly, while the Government argues that the Unions' decision not to enforce the non-discrimination provisions of the collective bargaining agreement "applied equally to black and white employees" (U.S. Brief 8), "the reality is that the [decision's] impact falls on the minority." *Hunter v. Erickson*, 393 U.S. at 391. There is no evidence that Lukens discriminated against white employees, or that any white employees asked the Unions to file grievances alleging race discrimination. Moreover, even if such evidence existed, this Court has already rejected the argument that policies based on race that affect both blacks and whites are not discriminatory. In *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), this Court held, "Although a ban on intermarriage or interracial dating applies to all races, decisions of this Court firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination." *Id.* at 605 (citations omitted). *See also Loving v. Virginia*, 388 U.S. 1, 11-12 (1967).

The Unions' excuse for this conduct is that the assertion of racial discrimination in grievances tends to stiffen the company's resistance and make grievances harder to settle. In light of the paucity of their grievances alleging racial discrimination, it is hard to understand what basis they had for this belief. Even if it is true, however, it does not justify their conduct. Avoidance of racial conflict or other effects of racial prejudice is not a sufficient justification for denying minorities their rights. Thus, in *Palmore v. Sidoti*, 466 U.S. 429 (1984), this Court unanimously reversed a Florida court's decision removing a white child from the custody of its mother because she had married a black man. This Court rejected the Florida court's rationale that the social stigma borne by an interracial family would be harmful to the child. It acknowledged "the reality of private biases and the possible injury they might inflict" but held, "The Constitution cannot control such prejudices but neither can it tolerate them." 466 U.S. at 429. *See also Buchanan v. Warley*, 245 U.S. 60, 81 (1917).

It is also significant that Title VII goes beyond the Fourteenth Amendment in its prohibition of such racial classifications. Under the Fourteenth Amendment, "[s]uch classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purpose." *Palmore v. Sidoti*, 466 U.S. at 432-33 (citations omitted). Title VII, however, prohibits racial classifications without qualification.[23] Not only does it forbid unions to discriminate on the basis of race or color, but also it explicitly forbids a union "to classify its membership . . . in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee" because of race or color. Section 703(c)(2), 42 U.S.C. § 2000e-2(c)(2). Thus, even a "compelling . . . interest" cannot justify the Unions' inten-

23. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) ("Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices").

tional differentiation between grievances involving racial matters and those involving other concerns.[24]

In a finding not alleged to be clearly erroneous, the District Court concluded that "[t]he clear preference of both the company and the unions to avoid addressing racial issues served to perpetuate the discriminatory environment." (Pet. App. 138a.) Thus, the Unions' open and deliberate policy of avoiding enforcement of the non-discrimination provisions of the collective bargaining agreement constituted disparate treatment which limited black employees' employment opportunities and adversely affected their status as employees because of their race.[25]

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24. Both the Unions and the Government base their entire arguments regarding the meaning of Title VII on § 703(c)(3), which states that a union must not "cause or attempt to cause an employer to discriminate against an individual in violation of this section." 42 U.S.C. § 2000e-2(c)(3). The Unions beg the question by asserting that Sections 703(c)(1) and (c)(2) "do not address the question of union responsibility for employer discrimination—the issue presented by this case. That issue is addressed expressly and exclusively by § 703(c)(3)." (Unions' Brief 26 (footnote omitted).) The Unions simply misstate the issue in this case. The issue here is not "union responsibility for employer discrimination"; rather, it is the Unions' responsibility for their *own* racial discrimination in classifying the provisions of the collective bargaining agreement for differential enforcement to the detriment of their black members.

Even if one considers only the provisions of § 703(c)(3), however, the Unions violated Title VII by intentionally treating violations of the non-discrimination provisions differently from other grievances. The Unions urge that the legislative history of one provision of the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(2), describes "precisely what Congress had in mind" (Unions' Brief 32) in selecting the phrase "to cause or attempt to cause". Yet, according to the colloquy quoted by the Unions, the prohibitions against a union under this language would apply not only to new agreements, "but to an existing agreement where a labor organization would *attempt to maintain* a discriminatory pattern in an old agreement and resist efforts to change to the pattern required by this act." 109 Cong. Rec. 9209 (1963), *quoted at* Unions' Brief 33 (emphasis added). If a union "attempt[s] to cause" employer discrimination by "attempt[ing] to maintain" a discriminatory pattern in an old agreement, surely a union must "cause or attempt to cause" employer discrimination by implementing policies which, as the District Court found, "serve[ ] *to perpetuate* the discriminatory environment." (Pet. App. 138a (emphasis added).)

25. The Government is also wrong in claiming that the District Court's

C. The Ruling of the Courts Below Is Consistent With Federal Labor Policy.

In order to exaggerate the impact of the lower courts' decisions in this case, the Unions erroneously stretch those decisions far beyond their terms. Thus, the Unions argue extensively that Title VII does not impose "an affirmative duty on unions to combat employer discrimination" (Unions' Brief 34), and that the imposition of such a duty "would be destructive of the system of collective bargaining established by the national labor laws" (Unions' Brief 35). But the question of whether such a broad duty exists is simply not raised by the facts of this case, which presents a far narrower issue than the Unions claim. Therefore, in assessing whether the rulings below are consistent with "national labor policy", the Unions' arguments must be narrowed in two respects: (1)

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decision did not amount to a finding of disparate impact. (U.S. Brief 8-10 & n.7.) Having found a disparate treatment violation by the Unions, it was not necessary for the District Court to address the evidence explicitly in terms of disparate impact. The Court's findings, however, plainly cover disparate impact. The District Court found that the Unions' reluctance to grieve racial discrimination "served to perpetuate the discriminatory environment" (Pet. App. 138a), and thus had a disparate impact on black employees at Lukens. In this respect, this Court has already noted that the significance of an individual discrimination grievance is far broader than the particular requested relief. In *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975), this Court stated:

> Nor is there any reason to believe that the processing of grievances is inherently limited to the correction of individual cases of discrimination .... [O]ne would hardly expect an employer to continue in effect an employment practice that routinely results in adverse arbitral decisions.

Id. at 66-67 (footnote omitted).

The District Court also found disparate impact when it found that blacks were discharged during their probationary period at a disproportionate rate, and the Unions knew this but refused to make use of the nondiscrimination provisions of the collective bargaining agreement to challenge it. (Pet. App. 137a.)

The District Court also considered and rejected the Unions' claimed "business necessity" (or "union necessity") reason for the disparate impact. (Pet. App. 138a.) The Unions have never claimed that the seniority system had any impact on their processing of race discrimination grievances, and it is hard to see how it could have any impact.

with respect to the *cause* of the Unions' failure to protest employer racial discrimination, and (2) with respect to the type of union activity—collective bargaining or processing grievances—involved.

First, there are several possible reasons for a union's failure to combat racial discrimination. A union may place a numerical limit on the number of grievances it can handle in a given time period and apply that limit across the board. A union may conclude that it will only grieve violations of one contract provision and refuse to grieve *all* others, including racial discrimination. Or a union may simply fail to grieve racial discrimination grievances inadvertently.

It is not necessary in this case to reach the broad issue of whether a union is *always* liable under Title VII for failure to combat employer discrimination *for any reason.*[26] For here,

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26. Although the present case involves more than "mere acquiescence" on the part of the Unions (Pet. App. 26a), a union is also liable under Title VII if it fails to take affirmative steps to combat known employer discrimination. *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 989 (D.C. Cir. 1973). Given its representational role in both bargaining and grieving, a union which acquiesces in employer discrimination discriminates against black members of the bargaining unit by failing to represent their interests in a matter which significantly affects the members' employment opportunities. Most courts faced with this issue have so held. *See Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs*, 807 F.2d 330, 338 (3d Cir. 1986); *Howard v. International Molders Union, Local 100*, 779 F.2d 1546, 1553 (11th Cir.), *cert. denied*, 106 S. Ct. 2902 (1986); *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 868 (7th Cir. 1985); *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1304 (9th Cir. 1982), *cert. denied*, 467 U.S. 1251 (1984); *Farmer v. ARA Services, Inc.*, 660 F.2d 1096, 1104 (6th Cir. 1981); *Romero v. Union Pacific R.R.*, 615 F.2d 1303, 1310-1311 (10th Cir. 1980); *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364, 1384 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978); *Gray v. Greyhound Lines, East*, 545 F.2d 169, 174 n.15 (D.C. Cir. 1976); *Smith v. South Cent. Bell Tel. Co.*, 518 F.2d 68, 70 (6th Cir. 1975); *Egger v. Local 276, Plumbers & Pipefitters Union*, 644 F. Supp. 795, 802 (D. Mass. 1986); *Dickerson v. United States Steel Corp.*, 472 F. Supp. 1304, 1353-1354 (E.D. Pa. 1978), opinion on motion to dismiss, 439 F. Supp. 55, 62-63, 83 (1977); *United States v. Buffalo*, 457 F. Supp. 612, 639 (W.D.N.Y. 1978); *Lewis v. Bethlehem Steel Corp.*, 440 F. Supp. 949, 974 (D. Md. 1977); *Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252, 283 (N.D. Ind. 1977); *Hairston v. McLean Trucking Co.*, 62

both the District Court and the Court of Appeals found that the Unions had not failed to act out of inadvertence or as part of a non-discriminatory policy applied equally to all types of grievances. To the contrary, the lower courts found that the Unions intentionally failed to prosecute grievances raising racial issues "either so as not to antagonize the employer and thus improve [their] chances of success on other issues, or in deference to the perceived desires of [their] white membership." (Pet. App. 139a-140a.)[27] The Unions' arguments about national labor policy must be considered, not in the extreme case of union inadvertence or non-discriminatory selection of grievances, but in the context of this case, in which the Unions made the deliberate decision not to press racial grievances simply because of their racial character.[28]

Second, in their discussions of national labor policy, the Unions incorrectly focus on their obligations in collective bargaining. The District Court did not find that the Unions

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F.R.D. 642, 660, 673-675 (M.D.N.C. 1972), *vacated on other grounds*, 520 F.2d 226 (4th Cir. 1975). *See also McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285 (1976) (reversing district court's dismissal of Title VII claim against a union which allegedly "acquiesced and/or joined in" the employer's alleged racial discrimination).

The EEOC has concluded that "[i]n the absence of evidence that the union actively opposed inclusion of the unlawful [discriminatory] provisions in the [collective bargaining] agreement . . . the union has engaged in unlawful employment practices within the meaning of Section 703(c) of Title VII." EEOC Decision No. 71362, 2 F.E.P. Cases 1086, 1088 (Oct. 22, 1970).

27. Although the Unions and Government emphasize the statement in the opinions of the courts below that "mere passivity" on the part of unions in the face of employer discrimination violates Title VII (Unions' Brief 18, 21; U.S. Brief 4), neither of the courts below relied on that general statement as a basis for its holding in this case. To the contrary, the District Court held that "the evidence in this case proves far more than mere passivity on the part of the unions." (Pet. App. 139a.) Similarly, the Court of Appeals noted that "[t]he case against the unions here is stronger than one of mere acquiescence." (Pet. App. 26a.)

28. Nor does this case involve the issue of whether a union is liable "for failing to *neutralize* an employer's discrimination." (U.S. Brief 23 (emphasis added).) Rather, the District Court found in this case that the Unions "almost never" even *attempted* to combat employer discrimination by asserting racial discrimination grievances. (Pet. App. 138a.)

were liable for failing to negotiate against Lukens' discriminatory practices at the bargaining table. Rather, the District Court's finding was based centrally on the Unions' repeated failures "to include racial discrimination as a basis for grievances or other complaints against the company." (Pet. App. 137a.)[29]

The national labor policy implications of the lower courts' holdings must therefore be addressed with respect to the precise issue raised by this case: Does a union violate Title VII by deliberately treating the non-discrimination provisions of its collective bargaining agreement differently from other provisions, so that it intentionally avoids filing grievances for racial discrimination even though many of its members complain of widespread employer racial discrimination and the union's conduct serves to perpetuate a racially discriminatory environment?[30]

In a leading case involving the relationship between a union and its members, this Court stated that a union has obligations in representing its members parallel to those of a

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29. As noted by one commentator in analyzing a union's liability under Title VII, "[t]he process of negotiation is much more complex, involving as it does questions of majority rule and the give and take of bargaining, than the administration of grievances. The union's obligation, and therefore its potential liability, is much clearer in grievance processing." Larson, *Employment Discrimination*, ¶ 44.50, 9-39 (1983) (footnote omitted).

30. A non-discrimination provision is a frequent feature of collective bargaining agreements. According to an analysis made by one author, approximately 84% of the collective bargaining agreements on file with the Bureau of National Affairs in 1979 contained general non-discrimination provisions, an increase from 28% in 1965, 46% in 1970, and 74% in 1975. Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702, 712 n.60 (1980).

After the Court of Appeals' decision in this case, the Third Circuit again relied upon the existence of a non-discrimination provision in the collective bargaining agreement in recognizing the obligations which Title VII imposes on a union with respect to employer discrimination. In *Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs*, 807 F.2d 330 (3d Cir. 1986), the Court held that, if a union learns of discrimination by the employer, "it will owe an affirmative duty to its minority members to take action against the offending employer or employers to enforce the non-discrimination provisions of its collective bargaining agreements." *Id.* at 338.

government representing its citizens. In *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944), this Court held that a union

> is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights.

323 U.S. at 198. Turning to the legislative scheme established by Congress to regulate labor unions, the Court concluded that:

> the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates.

Id. at 202.[31] Thus, in creating the duty of fair representation in *Steele*, this Court recognized that, while a union may be a "majoritarian organization" (Unions' Brief 45), it does not have plenary power to represent solely the interests of the majority, but is "under an affirmative . . . duty equally to protect [the] rights" of minority members of the bargaining unit.

The foundations and extent of this duty are spelled out in a recent decision upon which both the Unions and the Government rely: *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975). In that case, this Court stated, "Plainly, national labor policy embodies the principles of nondiscrimination as a matter of highest priority . . . ." 420 U.S. at 66 (citations omitted). Nevertheless, it held that minority employees with complaints of racial discrimination are not protected by the National Labor Relations Act when they organize to bargain with their employer *independently* of their union. Rather, this Court held that they were

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31. In *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953), the Court held that unions owe a similar duty of fair representation under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*

required to proceed through established union channels to seek the relief they were demanding, and the union, "as representative of *all* [collective bargaining] unit employees", had a corresponding "duty fairly and in good faith to represent the interests of minorities within the unit." 420 U.S. at 64 (emphasis in original). The Court noted:

> The collective-bargaining agreement involved here prohibited without qualification all manner of invidious discrimination and made any claimed violation a grievable issue. The grievance procedure is directed precisely at determining whether discrimination has occurred.

420 U.S. at 66 (footnote omitted).

If the union could ignore such non-discrimination provisions at will, as the Unions and the Government argue in the present case, the provisions themselves would be of scant use to minority employees, and this Court's discussion of the channels available to minority employees for protesting discrimination through grievances would provide little comfort to these employees. Indeed, this Court expressly stated:

> When union and employer are not responsive to their legal obligations, the bargain they have struck must yield *pro tanto* to the law, whether by means of conciliation through the offices of the EEOC, or by means of federal-court enforcement at the instance of either that agency or the party claiming to be aggrieved.

420 U.S. at 70.

Thus, in accommodating the goals of Title VII and the national labor policy, this Court has recognized that non-discrimination principles are "a matter of highest priority" for national labor policy, that unions have a responsibility to represent the interests of minorities through the grievance process, and that they can be held accountable "through the offices of the EEOC, or by means of federal-court enforcement" for failing to fulfill that responsibility.

The holding of the Court of Appeals in the present case goes no further. A union's reason for existence, as stated by the Government, is "to represent the bargaining unit employ-

ees' interests and to press their claims with the employer." (U.S. Brief 20.) By their reluctance to fulfill these functions with respect to complaints of racial discrimination—and only racial discrimination—the Unions at Lukens denied their minority members equal access to, and protection of, the sole mechanism for enforcing their contractual rights, the grievance system. *Cf. Washington v. Seattle School District No. 1*, 458 U.S. 457, 470 (1982); *Hunter v. Erickson*, 393 U.S. 385, 390 (1969).

The Unions assert that the policy considerations underlying the NLRA allow unions to "determine their own bargaining agendas and their own priorities" (Unions' Brief 37), and that Title VII does not impose a duty on unions to take certain substantive positions such as opposing employer discrimination (Unions' Brief 36-39). Obviously, there may be situations in which unions cannot assert all grievances presented to them, and unions must establish priorities to select some grievances for prosecution and not others. The District Court and Court of Appeals in this case did not base their holdings on the assumption that Title VII requires that unions *always* raise grievances involving racial discrimination by the employer or that this type of grievance be given special priority.[32] For example, a grievance that appears to lack merit may be rejected by a union whether it raises racial discrimination issues or other issues. Title VII does, however, forbid unions to systematically treat grievances differently on the basis of the racial nature of the grievance.[33]

This Court has already rejected the argument that a union's discretion to select among the interests of its members is not restrained by Title VII. In *McDonald v. Santa Fe Trail*

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32. Contrary to the Unions' assertion (Unions' Brief 41), the holdings of the lower courts in this case do not impose any obligation on unions to take a substantive position opposed to racial discrimination. Rather, they hold only that the Unions must treat their members' existing contractual rights to be free from racial discrimination the same as they treat their members' other contractual rights.

33. Even accepting the Government's argument that "Congress in Title VII did not seek . . . to require that certain claimants get preferential treatment" (U.S. Brief 21), Title VII must mean at least that claimants shall not receive *inferior* treatment because their grievances raise racial issues.

Transportation Co., 427 U.S. 273 (1976), the union argued in defense to a Title VII claim that "in representing all the affected employees in their relations with their employer, the union may necessarily have to compromise by [protecting the interests] of only some." *Id.* at 284-85. This Court rejected that argument, holding that "whatever factors the mechanisms of compromise may legitimately take into account in mitigating discipline of some employees, under Title VII race may not be among them." *Id.* at 285.[34]

The Unions also argue that Congress gave employees the right to enforce their Title VII substantive rights by filing a claim with the EEOC or suing their employer in federal court, so Congress could not have intended that unions be obligated "to spend scarce resources processing grievances that, if successful, will only *replicate* remedies that are available to the affected employees under Title VII." (Unions' Brief 41 (emphasis in original).)[35] An individual's remedy for employer discrimination under Title VII through the EEOC and federal court litigation, however, is not identical to the grievance-arbitration mechanism for violations of a non-discrimination provision in the collective bargaining agreement. The EEOC/litigation route is more time-consuming and may impose sig-

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34. This Court has also recently reaffirmed the principle that even a government official ordinarily cloaked with broad discretion has discriminated if he or she has made decisions based on racial factors. In *Batson v. Kentucky*, 106 S. Ct. 1712 (1986), this Court held:

> [T]he component of the jury selection process at issue here, the State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause. Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case to be tried . . . the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race . . . .

Id. at 1718-19 (footnote and citations omitted). *See also Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 485 (1982); *Hunter v. Erickson*, 393 U.S. 385, 390-91 (1969).

35. Similarly, the Government argues that "it is quite unnecessary" to require unions to press their members' discrimination claims against the employer, because the members can bring their own lawsuit under Title VII. (U.S. Brief 24.)

nificantly higher costs on the employee than the grievance-arbitration mechanism.[36] For a union to be permitted to ignore violations of a non-discrimination clause simply because the employee may have another, more difficult, mechanism for remedying the employer's discrimination, would allow the union to "impose[ ] substantial and unique burdens on racial minorities", *Washington v. Seattle School District No. 1*, 458 U.S. at 470, and would "render[ ] the non-discrimination clause in the collective bargaining agreement a dead letter" (Pet. App. 138a). This would also contravene Congress's determination that "the policy against discrimination . . . be of the 'highest priority' ". *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974), *quoting Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).[37]

Moreover, as discussed above, Title VII requires that a union not discriminate in its enforcement of the various provisions of the collective bargaining agreement, including non-discrimination provisions. That the members of the bargaining unit also have an independent right to protest employer

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36. *Compare Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 465 & n. 11 (1975) (noting the "significant delays that have attended administrative proceedings in the EEOC" and the "expensive litigation" that may be involved in prosecuting a Title VII claim), *with Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 55 (1974) ("the grievance-arbitration machinery of the collective-bargaining agreement remains a relatively inexpensive and expeditious means for resolving a wide range of disputes, including claims of discriminatory employment practices").

37. As observed in *Alexander v. Gardner-Denver Co.*, "legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination." 415 U.S. at 47 (footnote omitted). In *Alexander*, a case which "concern[ed] the proper relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements in the resolution and enforcement of an individual's rights to equal employment opportunities under Title VII", *id.* at 38, this Court stated that "Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination," *id.* at 48-49, and held that an employee has a right to a trial *de novo* in a federal court on his Title VII claims, even if he has already pursued through arbitration a claim under the non-discrimination clause of the collective-bargaining agreement. *Id.* at 59-60. The arguments of the Unions and the Government would have this Court overrule *Alexander* by holding that Title VII supplanted black employees' NLRA right to fair representation in grievance processing.

discrimination through the EEOC and federal court litigation does not remove the union's obligation under Title VII to represent its members without discrimination, *i.e.*, without taking racial issues into consideration, in deciding whether to enforce their contractual rights under the collective bargaining agreement.[38]

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38. Bargaining unit members have two mechanisms through which they can protest racial discrimination by their union. First, as this case shows, union members can file an EEOC charge against the union alleging discrimination under Title VII and a subsequent lawsuit against the union under both Title VII and Section 1981. Second, the union member may have a claim against his union for breach of its duty of fair representation. *See Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944). In the landmark case of *Vaca v. Sipes*, 386 U.S. 171 (1967), this Court held: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190. A breach of the duty of fair representation is an unfair labor practice and may be presented to the NLRB, *see, e.g., Local 12, United Rubber Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); *Independent Metal Workers, Locals 1 & 2 (Hughes Tool Co.)*, 147 N.L.R.B. 1573 (1964), cited with approval in *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. at 64, or to the court under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, *Vaca v. Sipes*, 386 U.S. at 186-87; *Peterson v. Lehigh Valley Dist. Council*, 676 F.2d 81, 86-88 (3d Cir. 1982).

Several courts have concluded that the *Vaca* duty of fair representation standard applies in a Title VII case against a union, *see, e.g., Farmer v. ARA Services, Inc.*, 660 F.2d 1096, 1104 (6th Cir. 1981); *Causey v. Ford Motor Co.*, 516 F.2d 416, 424-25 (5th Cir. 1975); *Woods v. North Am. Rockwell Corp.*, 480 F.2d 644, 647-48 (10th Cir. 1973), and a leading commentator has concluded that "[b]ecause almost every conceivable grievance administration case under Title VII is in the context of disparate treatment (or pattern or practice), application of the *Vaca* standard should result in a proper holding under accepted principles of Title VII practice." Larson, *Employment Discrimination* ¶ 44.80, 9-48 (1983). *See* Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702, 710 (1980) ("It follows directly from *Vaca* that a union that remains passive in the face of a grievance alleging employer discrimination breaches the duty of fair representation unless its decision not to process the grievance was both rational and free of any bad faith or discriminatory purpose").

In holding that the Unions in the present case had violated Title VII, the Court of Appeals concluded that the Unions had also violated their duty of fair representation (Pet. App. 26a). (The court's conclusion with respect to the duty of fair representation does not constitute an independent ground of liability because the plaintiffs did not plead any LMRA claim.)

Significantly, the Unions' position in this case is contradicted by the conduct of the United Steelworkers International Union itself in bargaining for three separate non-discrimination provisions in the collective bargaining agreement. The purpose of negotiating provisions in a collective bargaining agreement is to establish rights that a union may enforce against the employer. If a union is acting in good faith, it makes no sense for it to obtain such rights and then refuse to enforce them.[39]

The Government also appears to assume that a union is permitted under Title VII to treat the non-discrimination provisions of a collective bargaining agreement differently from other provisions. In rejecting the holdings of the lower courts in this case, the Government argues:

> Ironically, the more discriminatory an employer's conduct, the more a union would have to concentrate its demands on the issue of discrimination, and the weaker it would be in all other bargaining areas.

(U.S. Brief 19 n.15.) Applying this argument to the precise issue raised in this case, it is hard to see how it is "ironic" to require a union to process more racial discrimination grievances in response to an increase in racial discrimination by the employer. If an employer's conduct systematically violates the seniority rights of employees, for example, one would expect the union "to concentrate its demands on the issue" of seniority and file more grievances involving breaches of the seniority provisions of the collective bargaining agreement. If a union treats grievances raising racial discrimination the same way as grievances involving other violations of the collective bargaining agreement, of course the union will file more grievances against employer discrimination the more the employer breaches the non-discrimination provisions. Title VII requires that a union respond to an employer's violations of the non-discrimination provisions of the collective

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39. As the Unions pointed out in their Brief, "a union that succeeds in obtaining any [non-discrimination] contract provisions may thereafter have to expend its resources in the grievance/arbitration procedure *in order to achieve any meaningful results*." (Unions' Brief 40 (emphasis added).)

bargaining agreement under the same standards as it responds to the employer's violations of other provisions of the agreement.[40]

The holding of the courts below is therefore consistent with national labor policy. By prohibiting unions from discriminating against their minority members in all matters, Section 703(c)(1) of Title VII does not interfere with the framework in which unions and employers bargain and enforce their bargains. Rather, Title VII permits a union to decide which grievances to pursue and which not to pursue, as long as that decision is not based on racial factors.

II. The Unions Violated Section 1981.

The District Court held the Unions liable under Section 1981 because the Unions *intentionally* chose to treat claimed violations of the contractual non-discrimination provisions differently from alleged violations of other collective bargaining agreement provisions. The Unions claim that this holding is contrary to this Court's opinion in *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375 (1982). (Unions' Brief 45-48.) In making this argument, the Unions ignore the language of Section 1981 and fail to acknowledge the central distinctions between the facts in *General Building Contractors* and the facts as found by the District Court in this case.

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40. Both the Unions and the Government equate employees' Title VII rights with their rights under other statutes designed to benefit employees, such as the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, and the Occupational Safety and Health Act ("OSHA"), 29 U.S.C. § 651 *et seq.* The Unions and Government then argue that just as unions have no obligation to enforce their members' rights under these statutes, unions have no obligation to enforce their members' Title VII rights. (Unions' Brief at 39-40; Government's Brief at 18-19 n.14.)

This argument misconstrues the holdings of the courts below, which imposed Title VII liability on the Unions for their own discrimination *in the enforcement of the collective bargaining agreement*, not for their failure to enforce their members' Title VII rights against Lukens. Without a provision in the collective bargaining agreement requiring that the employer comply with the terms of ERISA, OSHA or FLSA, a union would have no basis on which to enforce the employees' rights under these statutes through the grievance mechanism.

Section 1981 provides that "all persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." When a collective bargaining agreement contains a clause prohibiting racial discrimination, but a union, in the face of known employer discrimination, deliberately follows a policy against enforcing that provision, the union deprives the minority employees of the same right to enforce the collective bargaining agreement as is enjoyed by whites.[41] Therefore, a union's intentional decision to treat the provisions of its contract differently, by avoiding the enforcement—through grievances—of prohibitions on racial discrimination, subjects it to liability under Section 1981.[42]

The Unions' reliance on *General Building Contractors* to support their position is totally misplaced. In that case, the plaintiffs claimed that a union and a class of employers had discriminated in the operation of an exclusive hiring hall for construction industry workers. The district court found that the union had intentionally discriminated in its operation of the hiring hall, but found that the employers "did not intentionally discriminate against minority workers and neither knew nor had reason to know of the Union's discriminatory practices." 458 U.S. at 383. Nevertheless, the district court held that *both* the union and the employers were liable under

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41. As the District Court pointed out, "the unions' unwillingness to assert racial discrimination claims as such rendered the non-discrimination clause in the collective bargaining agreement a dead letter." (Pet. App. 138a.)

42. Even without a finding of "far more than mere passivity" on the part of a union (Pet. App. 139a), several federal courts have held that a union may be found liable under Section 1981 for failing to oppose employer discrimination. *See Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1304 (9th Cir. 1982), *cert. denied*, 467 U.S. 1251 (1984); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 993-94 (D.C. Cir. 1973); *Dickerson v. United States Steel Corp.*, 472 F. Supp. 1304, 1353 (E.D. Pa. 1978). As the court observed in *Dickerson*, "a union's acquiescence in discriminatory company conduct" is actionable under Section 1981 because a "union's failure . . . to protest discriminatory treatment is in itself discrimination." 472 F. Supp. at 1353. While plaintiffs agree with these decisions, the holdings of the lower courts in the present case are more limited.

Section 1981 for racial discrimination. The employers appealed the district court's holding,[43] and this Court reversed.

The basis for this Court's decision in *General Building Contractors* was the holding that disparate impact alone did not violate Section 1981. Rather, this Court held, Section 1981 proscribed only "purposeful" discrimination. 458 U.S. at 391. Recognizing the significance of the district court's factual finding that the employers had not intended to discriminate and neither knew nor should have known of the union's discrimination, and finding no other basis for the employers' Section 1981 liability, this Court reversed the district court's imposition of Section 1981 liability on the employers.[44]

The holding of *General Building Contractors* has no application to the facts of the instant case. The district court's finding that the employers in *General Building Contractors* were innocent of intentional discrimination and neither knew nor should have known of the union's discrimination was uncontested on appeal.[45] As this Court noted, " '[n]ot even acquiescence of the whole class of employers in the sense of a conscious toleration of the discrimination of the union ha[d] been shown' ", 458 U.S. at 382 n.7 (brackets in original), quoting the district court's opinion, *Pennsylvania v. Local Union 542, International Union of Operating Engineers*, 469 F. Supp. 329, 413 (E.D. Pa. 1978).

By contrast, in the present case, the district court found that the Unions were fully aware of Lukens' discriminatory conduct, yet intentionally chose to discriminate by avoiding

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43. The Court of Appeals for the Third Circuit, sitting *en banc*, affirmed the judgment of the district court by an equally divided vote. 648 F.2d 923 (1981).

44. *General Building Contractors*' further holding that the defendant employers were not vicariously liable for the defendant union's intentional discrimination, 485 U.S. at 391-395, is of no relevance here. The plaintiffs here have never claimed that the Unions were vicariously liable for Lukens' intentional discrimination.

45. *See Pennsylvania v. Local 542, Int'l Union of Operating Engineers*, 569 F. Supp. 582, 587 (E.D. Pa. 1983) (interpreting *General Building Contractors* after remand).

grievances which sought to assert violations of the non-discrimination provisions of the collective bargaining agreement. As stated by the trial court, the Unions "intentionally avoid[ed] asserting discrimination claims" (Pet. App. 139a), "even though the union itself believed that racial discrimination was involved in the grievance" (Pet. App. 138a). With *both* the requisite awareness and intent, the Unions—unlike the employers in *General Building Contractors*—were properly found to have violated Section 1981.

Moreover, even if the employers in *General Building Contractors had* been aware of the union's discrimination, that case would not be relevant to the issue of the Unions' Section 1981 liability here. Whatever an *employer's* affirmative obligations to seek to protect its employees from a union's discrimination may be, a *union*—with extensive and recognized representational obligations to its members—may not discriminate on racial grounds in this representation. *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 203 (1944). Indeed, the Government has explicitly recognized "the differing role and nature of employers and unions." (U.S. Brief 20.) As the Government states, "a union exists to represent the bargaining unit employees' interests and to press their claims with the employer." (*Id.*) An employer has no such responsibility. Thus, although an employer may have no duty to protect its employees from union discrimination, a union clearly has a responsibility to represent the interests of minority employees "and to press their claims with the employer" at least as vigorously as it presses other claimed violations of the collective bargaining agreement. Otherwise, it is violating Section 1981 by denying minority employees "the same right . . . to . . . enforce [the collective bargaining agreement] . . . as is enjoyed by white [employees]."

The policy considerations discussed with respect to the obligations imposed on unions under Title VII apply to Section 1981 as well.[46] Section 1981's mandate that minority

46. Several Courts of Appeals have noted that, in the employment discrimination context, the substantive standards for liability for intentional discrimination under Title VII and Section 1981 are generally the same. *See Whatley v. Skaggs Co.*, 707 F.2d 1129, 1139 (10th Cir.), *cert. denied*, 464

members of a union have the same right to enforce their collective bargaining agreement as is enjoyed by white members does not impose an obligation on the union to set any particular priorities. Nor does Section 1981 impose any additional enforcement obligations on a union. Rather, Section 1981 requires, as does Title VII, that in enforcing the terms of the collective bargaining agreement, a union not discriminate among the grievances raised by its members on the basis of whether the grievances involve issues of race.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals holding Petitioners United Steelworkers of America, AFL-CIO-CLC, and its Local Unions 1165 and 2295 liable to Respondents under Title VII and Section 1981 should be affirmed.

Respectfully submitted this 9th day of March, 1987.

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U.S. 938 (1983); *London v. Coopers & Lybrand*, 644 F.2d 811, 818 (9th Cir. 1981); *Scott v. Univ. of Delaware*, 601 F.2d 76, 80, n.2 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979); *Carrian v. Yeshiva Univ.*, 535 F.2d 722, 729 (2d Cir. 1976). Therefore, the same acts and omissions of a union which give rise to Title VII liability also give rise to Section 1981 liability, if intentionally discriminatory, and the policy implications of holding the Unions liable under these two statutes in this case are the same.